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No. 91-572

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In The

Supreme Court of the United States

October Term, 1991

ALLRIGHT COLORADO, INC.; CONTINENTAL AIRPORT PARKING, INC.; ENNIS, INC., d/b/a/ MONACO PARKING; PHCHODAUX HOWDY INTERNATIONAL GROUP, INC., d/b/a/ PREMIERE PARKING, INC.,

Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, a governmental subdivision of the State of Colorado, d/b/a SMART; JOHN MROZEK, in his capacity as Manager of Public Works; GEORGE DOUGHTY, in his capacity as Director of Aviation of Stapleton,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO NEW ARGUMENTS RAISED BY RESPONDENTS PURSUANT TO RULE 12-6

I. RESPONDENTS' STATEMENT OF THE CASE IGNORES AN EXPRESS FINDING OF THE TRIAL COURT: THAT RESPONDENTS DID USE THEIR GOVERNMENTAL POWER TO UNDERTAKE CONDUCT IN FURTHERANCE OF AN ATTEMPT TO MONOPOLIZE THE MARKET.

Petitioners feel compelled to reply to Respondents' implication that Petitioners were not truthful in their factual statement with respect to the findings of the trial court on the issue of intent to monopolize. The Petitioners' statement of the case contains a fair and accurate conclusion concerning the trial court's ruling on this issue. Although the Respondents would like to have this Court believe otherwise, the trial court found:

> There is also a case made for the fourth element, conduct in furtherance of an attempt to monopolize [citing examples from the evidence of Respondents' use of anticompetitive governmental fees and restrictions]. (Petition App. at 34-35).

Petitioners reaffirm their original position: The trial court found, based upon the evidence at trial, that Denver used its governmental power to hinder its private competitors in an attempt to monopolize a market in which it is now the largest market participant.

II. RESPONDENTS' SUGGESTION THAT PETITIONERS WOULD SOMEHOW DENY THE CITY AND COUNTY OF DENVER LAWFUL RIGHT TO COMPETE IS ERRONEOUS.

Respondents suggest that Petitioners do not think that the City and County of Denver should be allowed to enter the relevant airport shuttle bus parking market (see Respondents' Brief in Opposition at 6). This is a mischaracterization of Petitioners' argument. Petitioners have never taken this position. Petitioners have repeatedly stated that if the Respondent City and County of Denver chooses to become a commercial participant in the shuttle bus parking market, it must, like everyone else, comply with federal antitrust laws.

III. RESPONDENTS' THEORY THAT THE TRIAL COURT'S DECISION, ADVERSE TO PETITIONERS, RENDERS THE CASE "MOOT" OR CAUSES ANY DECISION OF THIS COURT TO BE ADVISORY IS ERRONEOUS AND GROSSLY MISLEADING.

Respondents point out, accurately, that the trial court rendered a decision adverse to the Petitioners on the issue of whether the City and County of Denver had monopoly power as that term is used in Section II of the Sherman Antitrust Act. However, the trial court's ruling on the monopoly power issue was a ruling on the law, not on the facts, and was itself the principal issue in the Petitioners' appeal to the Tenth Circuit, and therefore the trial court's adverse ruling on this issue is not dispositive and does not cause the issue raised on this appeal to be moot.

Two legal issues of national importance were addressed by the trial court in this case. The first was whether the City and County of Denver had state action antitrust immunity and the second was whether local governmental power could constitute "monopoly power" as that term is used in Section II of the Sherman Antitrust Act. The trial court ruled in favor of the Petitioners on the first issue, and adversely to Petitioners on the second. Both issues were presented to the Tenth Circuit by an appeal and cross-appeal (Petition App. at 8-9). The Tenth Circuit based its erroneous decision solely on the state action immunity issue and did not address the equally-important governmental power/monopoly power issue. (Petition App. at 21, "We therefore reverse the district court's conclusion that defendants' activities were not immune from antitrust challenge. Accordingly, we need not address the merits of the antitrust claims.")

Petitioners considered placing both issues into their Petition for Writ of Certiorari, but concluded that the second issue was not yet ripe for this Court's consideration. If this Court accepts Certiorari and reverses the Tenth Circuit on the immunity issue, the Tenth Circuit will have the opportunity to make the correct decision on the governmental power/monopoly power issue. However, the Respondents' assertion that the entire case is "moot" because the Petitioners lost "on the merits" (Brief in Opposition at 7) is a gross distortion of the status of the case.

The fact that the trial court decision went against the Petitioners on an issue which was itself the subject of appeal and which has never been addressed by the appellate court does not render an issue "moot." *Powell v.*

McCormack, 395 U.S. 486, 500, 89 S.Ct. 1944, 1953, 23 L.Ed.2d 491, 505 (1969). In *Powell*, as in this case, Respondent "confuses mootness with whether [Petitioner] has established a right to recover." We are now before this Court to establish a right to be heard, it remains to be seen whether, on remand, the Tenth Circuit will correct the trial court's error on the monopoly power issue. *Powell v. McCormack*, 395 U.S. at 500 and 89 S.Ct. at 1953, 23 L.Ed.2d at 505, footnote 16 cogently sets forth the appropriate procedure for disposition of a multiple issue case of the kind presently before this Court:

> Where a court of appeals has misconceived the applicable law and therefore failed to pass on a question, our general practice has been to remand the case to that court for consideration of the remaining issues.

There is no mootness here, clearly the parties continue to have a personal stake in the outcome, the courts are capable of resolving the controversy, *United States Parole Commission v. Geraghty*, 445 U.S. 388, 394, 100 S.Ct. 1202, 1208, 63 L.Ed.2d 479, 490 (1980), the issues remain "live," and it is beyond question that the "parties have a legally cognizable interest in the outcome." *Murphy v. Hunt*, 445 U.S. 478, 481, 102 S.Ct. 1181, 1185, 71 L.Ed.2d 353, 358 (1982).

Petitioners appreciate the opportunity afforded by the Respondents to mention that there are two issues of clear national importance in this case, and that acceptance of Certiorari will allow both of these issues to be addressed at the appellate level; with the state action antitrust immunity issue to be addressed by this Court and, the governmental power/monopoly power issue to

be addressed by the Tenth Circuit upon remand. To Petitioners' knowledge, the governmental power/monopoly power issue has not yet been judicially addressed in any published opinion.

Respectfully submitted,

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